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In The

Supreme Court of the United States

October Term 1997

DAVID EUGENE HALL,

Petitioner,

v.

CHARLES HIPPS,
Jackson County District Attorney,
in his Individual and Official Capacity;
HAROLD MCMAHAN,
Town of Sylva Chief of Police
in his Individual and Official Capacity;
MARLENE HYATT,
Thirtieth Judicial District Superior Court Judge,
in her Individual and Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

1. Whether the petitioner has sufficiently stated a deprivation of a recognized life, liberty, or property interest when, while working as a law enforcement officer, he was held at the beginning and end of a 14-month long criminal court case to have violated state law and to have engaged in various wrongdoings without ever receiving notice, a hearing, or formal charges.

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The opinion of the court of appeals is unpublished and is reproduced in the Appendix to this brief (hereinafter, "App") on App.-1. Hall did not seek rehearing in the Court of Appeals. The opinion of the District Court (App.-6), is also unpublished.

JURISDICTION

The Court of Appeals entered its judgment on July 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1)(1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution reads in pertinent part:

   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. Section 1983 (1994) reads in pertinent part:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Procedural Facts.

Hall brought a claim in the United States District Court, Western District of North Carolina, Asheville Division, on July 18, 1995 and pursuant to 42 U.S.C. Section 1983, alleging that his rights to due process under the Fourteenth Amendment had been violated by all of the defendants. In the District Court, Hall also alleged jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 1331.

McMahan answered on August 30, 1995, and Jackson County, North Carolina answered on August 31, 1995. Hipps and Hyatt moved to dismiss September 28, 1995. Chief U.S. Magistrate Judge J. Toliver Davis filed a Memorandum and Recommendation on November 1, 1995, in which he advised that Defendants Hipps' and Hyatt's Motion to Dismiss be granted because the Plaintiff had not filed his response to the Motion to Dismiss by the deadline for such, and, in the alternative, that the Petitioner had failed to state a claim under the Fourteenth Amendment.

The Petitioner responded on November 13, 1995 with a Motion for Leave to File a Response Out of Time, an Objection to the Memorandum and Recommendation by the Chief Magistrate Judge, a Motion to Amend his Complaint, and Response to Defendants' Hipps' and Hyatt's Motion to Dismiss.

McMahan filed a response opposing the Plaintiff's motion to amend his complaint, and filed a Judgment on the Pleadings on November 27, 1995. Defendants Hipps and

Hyatt filed a Memorandum of Additional Authorities on February 2, 1996.

The U.S. District Court, Western District of North Carolina, Asheville Division, granted the Respondents' motions on March 1, 1996. On March 11, 1996, the Court issued its judgment dismissing Hall's claims against Hipps and Hyatt, based on the Memorandum and Recommendation by Chief United States Magistrate Judge J. Toliver Davis.

Hall filed an appeal in the Fourth Circuit Court of Appeals on June 13, 1996. The Respondents filed a reply brief on October 7, 1996. Oral argument was heard on June 2, 1997. The Court of Appeals issued a per curiam decision on July 25, 1997, in which it said in a footnote, "Hall argues that the district court misunderstood his claim as alleging defamation; instead, he asserts an invasion of his 'right to be free of prosecutorial actions in which he is repeatedly named and cited but not prosecuted, when that prosecutorial action is injurious to the Plaintiff's name, reputation and livelihood.... This court has never recognized such a right and we decline to do so here.'" Hall then filed this petition for Writ of Certiorari without seeking a rehearing.

Statement of the Facts

The Petitioner was employed as the Officer in Charge of the Smoky Mountain United Narcotics Investigative Team (hereinafter, "SMUNIT"), a multijurisdictional task force located in Sylva, Jackson County, North Carolina.[1] SMUNIT was formed to investigate crimes involving drugs. The Petitioner was thus employed from June 8, 1989 to July

[1] Unless otherwise indicated, all of the information in this section is from the Plaintiff's Complaint filed July 18, 1995 in the United States District Court, Western District of North Carolina, Asheville Division, Case No. 1:45cv154D, and reproduced in the Appendix for the United States Court of Appeals for the Fourth Circuit, Record No. 96-1899.

24, 1992. He was appointed to his post by election of the SMUNIT Board of Directors. The Petitioner was on loan to SMUNIT from the Jackson County Sheriff's Department, where he was a deputy sheriff.

At all times relevant to the Petitioner's allegations, McMahan was serving as Chief of Police for the Town of Sylva, North Carolina and was a member of the SMUNIT Board of Directors until July 23, 1992.[2] The Town of Sylva was a participating member of SMUNIT. Chief of Police McMahan served as chairman of the SMUNIT Board of Directors from June 15, 1992 to July 22, 1992, at which time he resigned during a meeting of the Board. On July 22, the Board rejected all proposals for an inventory of SMUNIT. On July 23, 1992, McMahan wrote to District Attorney Hipps, informing him that the Town of Sylva was withdrawing from SMUNIT. McMahan then requested that Hipps conduct a thorough audit of SMUNIT assets, equipment, and evidence. At this point, McMahan was no longer on the Board, nor was his Town a participating member in SMUNIT.

At all times relevant to the Petitioner's allegations, Hipps was serving as the District Attorney for North Carolina Prosecutorial District 30, a seven-county area which includes Jackson County and the Town of Sylva.

On July 24, 1992, McMahan provided a verification under oath for a motion by Hipps to be presented to the North Carolina Superior Court judge for District 30B, the Honorable J. Marlene Hyatt, seeking authorization for Hipps to seize and investigate SMUNIT. (App.-43) In this motion, and the ensuing Order, Hall was alleged and held to have violated state law and to have committed other acts of

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[2] All heads of participating law enforcement entities were automatically appointed to the Board. District Attorney Hipps was also automatically made a member.

wrongdoing in his daily management of SMUNIT. Hipps also falsely stated that the Board had voted at a meeting on July 22, 1992, for a thorough audit of SMUNIT to be conducted by the District Attorney. McMahan, who was present at the July 22 meeting, stated in his Answer that he had no knowledge of the day-to-day operation of SMUNIT, and that he had only rare occasion to visit SMUNIT headquarters. His sworn verification of the veracity of Hipps' allegations was not truthful.

Hipps provided the Petitioner with no notice of his intent to present his motion to the court, and never notified him of any hearing. Hipps requested and received an ex parte hearing from Judge Hyatt. Hyatt apparently did not require that the Petitioner be present before she found as a matter of law that he had violated state law and engaged in other wrongdoing. This was done prior to any investigation by Hipps. The court's order, prepared by Hipps prior to the hearing, allowed him to seize SMUNIT and shut down its investigations in order to conduct an audit. Hipps spoke that day with members of the media regarding his petition and the reasons he had given in it for seizure of SMUNIT, including his allegations about the Petitioner. The shutdown of SMUNIT was covered by local and regional television and radio stations, and newspapers.

On that same day, Hipps had SMUNIT headquarters padlocked by the Sylva Police Department, thus aborting all ongoing investigations. Thorough audits of evidence, funds, equipment, and other assets were conducted by Hipps' office over the next 14 months.

The Petitioner was stigmatized by the allegations and the state court's findings of fact and law. Due to his new-found notoriety, Hall was taunted by criminal defendants with whom he came in contact during the course of his work as a law enforcement officer. However, he was never charged with any crime. He had all of the stigma and none of the procedural safeguards due a criminal defendant. He

was never notified of the initial or subsequent hearings involving his conduct at SMUNIT. Hipps' Final Report, dated September 22, 1993, cited the Petitioner by name 10 times, and the final Order of September 24, 1993 cited the Petitioner 41 times. The Order stated 29 times that the Petitioner had committed wrongdoing as a matter of fact, and 11 times that he had committed wrongdoing as a matter of law. Hipps invited at least 48 people, many of them members of government and the media, to the final hearing, but he did not notify the Petitioner.

The Petitioner, overcome with depression and problems related to a former gunshot wound, retired on disability in December, 1992. He continues to be treated for reactive depression arising out of Respondents Hipps', Hyatt's, and McMahan's actions on July 24, 1992 and subsequent actions.

The Petitioner asserts that his Fourteenth Amendment rights to due process were violated by the Respondents in that he was cited as a criminal without being afforded notice, a hearing, or any other procedural safeguard afforded a citizen who expects to be free of arbitrary and capricious actions by government officials.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals for the Fourth Circuit declined to recognize, as a matter of first impression, the Petitioner's claims under the due process clause of the Fourteenth Amendment. Under Rule 1(c) of the Rules of the Supreme Court of the United States, a grant of certiorari may be entertained when a U.S. Court of Appeals decides an important question of federal law or, as in this case, has

decided a federal question by declining to do so.[3] The Court has delineated the violations of due process that might be brought about by a district attorney, and has noted the problem posed when a district attorney acts outside the scope of his immunity but who then does not charge the suspect with any crime.[4] "[T]hough several checks other than civil litigation prevent prosecutorial abuses in advising the police, 'one of the most important checks, the judicial process,' will not be effective in all cases, especially when in the end the suspect is not prosecuted.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 271; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2614 (1993), citing *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991). In both *Buckley* and *Burns*, the plaintiffs were eventually charged, and had the benefit of formal prosecution, and therefore were protected by the Constitutional and procedural guarantees of due process afforded an accused.[5] Here, the District Attorney, Respondent Hipps, involved the North Carolina State Bureau of Investigation, the North Carolina Governor's Commission on Crime Control, and the Federal Bureau of Investigation in his 14-month long search for evidence to support his decision to shut down SMUNIT. Hipps never brought any

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[3] The United States District Court, Western District of North Carolina, Asheville Division, in deciding the defendant's motions to dismiss, treated the Petitioner's claims as mere injuries to reputation, and did not address the Petitioner's larger due process concerns. (App. at)

[4] For example, the Court has decided that a prosecutor may be only qualifiedly immune for comments made to the press (*Buckley v. Fitzsimmons*, 509 U.S. 259; 125 L.Ed.2d 209; 113 S.Ct. 2606 (1993)); for advice made to the police (*Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991)), or for investigative work (*Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976)).

[5] Although they had to resort to civil rights litigation to prove an overstepping of the absolute immunity granted prosecutors.

charges, nor did he find reason to. The Petitioner suffered a total loss of credibility, effectiveness, and job-worthiness as a result of the District Attorney's actions.

Under the common law, and in numerous federal cases, the Congress and the courts have provided protection under the Fourteenth Amendment for citizens who have been harmed by over-zealous prosecutors.[6] Clearly, citizens are protected from prosecutorial abuses, and have civil rights protecting them from arbitrary and capricious acts of persons in state or federal government.

The net result is anomolous; persons who are eventually charged are afforded procedural safeguards firmly established in criminal procedure, whereas persons who are never charged are left without redress in the criminal arena, and can only hope for redress in the realm of civil rights litigation. The Petitioner has brought this 42 U.S.C. Section 1983 action in the hope that a federal court will examine the district attorney's actions in this case to determine if his failure to name the Petitioner as a defendant or to charge him formally during a 14-month long investigation violated the Petitioner's rights to due process under the Fourteenth Amendment.

The District Court abused its discretion in failing to consider these interpretations of the facts, characterizing the Petitioner's injury as one to his reputation, and thus analyzed the facts in a manner neither consistent with the allegations nor in a light most favorable to the Plaintiff. *Jordan v. Bowman Apple Products, Inc.* 728 F.Supp. 409, 411 (W.D.Va. 1990); *Morris Electronics of Syracuse, Inc. v. Mattel, Inc.*, 595 F.Supp. 56 (N.D.N.Y. 1984).

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[6] See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259; 125 L.Ed.2d 209; 113 S.Ct. 2606 (1993); *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976).

I. A prosecutor is not absolutely immune for his actions when he conducts a 14-month long investigation under the guise of a formal criminal proceeding wherein he fails to name an accused, but cites an individual for having violated state law in an ex parte and subsequent proceedings.

The test for absolute immunity "focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful." *Buckley v. Fitzsimmons*, 509 U.S. 259, 271; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2615, (1993), citing *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). The Petitioner contends that Respondent Hipps, under the guise of a criminal prosecution in which no one was prosecuted, was merely seizing SMUNIT, and using alleged conduct by the Petitioner as his rationale for doing so. Defendant Hipps was a member of the SMUNIT Board of Directors, and he could have acted through the SMUNIT Board to bring about an audit. Instead, he named the Petitioner in an ex parte motion, cited instances of lawbreaking and misconduct, but never formally charged him of any crime. Hipps' conduct was thus one of an investigator prior to a formal charge, or as an administrator who seized control of an arm of law enforcement for the purpose of conducting an audit, and thus he is not entitled to absolute immunity. *Mendenhall v. Goldsmith*, 59 F.3d 685 (7th Cir. 1995).

Prosecutors are absolutely immune for conduct in "initiating a prosecution and in presenting the state's case when that conduct is intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman* 424 U.S. 409, 430, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). Many of the acts alleged by Hipps do not fit within *Imbler's* function test. Prosecutors bear the burden of showing that any actions

complained of merit absolute as opposed to qualified immunity. *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (1991). There is a presumption that qualified immunity is sufficient for the actions taken by government officials. Id. at 558-559; *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982). The burden of proof is on the government official to show that acts taken by him are to be afforded absolute immunity. Id.

Imbler's function test is to be read narrowly and requires an objective view of the purpose of the official's action. *Hill v. City of New York*, 45 F.3d 653, 662-663 (2d Cir. 1995). In the present case, Petitioner Hall alleges that District Attorney Hipps filed an ex parte motion without probable cause in order to begin conducting an investigation. Hipps' motion solely served an investigatory function, as opposed to being part of the "judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976). As such, his actions should not be afforded the protection of absolute immunity. "Investigative work may not be transformed into advocacy simply by being characterized as work in preparation for trial; otherwise, absolute immunity against a suit brought by an innocent citizen for a constitutional wrong would always protect a district attorney who simply forces such a case to trial." *Buckley v. Fitzsimmons*, 509 U.S. 259, 276; 125 L.Ed.2d 209; 113 S.Ct. 2606, 2617 (1993).

Hipps opened a Superior Court criminal case without any criminal charges having been brought and without a named defendant for the sole purpose of conducting a criminal investigation. His motion and the subsequent order enabled him to seize control of SMUNIT's assets and records, to shut down SMUNIT operations, and to publicize his actions. The case file number in Hipps' action was 92

CRS 1395[7]. In North Carolina's General Court of Justice, this indicates a criminal case (in most cases a felony) being brought in the Superior Court. Although Hipps' actions in 92 CRS 1395 were largely administrative, he chose to designate the case as criminal. He named the Petitioner four times in his initial motion, and six times in the ensuing Order, but afforded the Petitioner no notice, no hearing, and no post-deprivation remedies. Hipps also did not ascertain whether McMahan had personal knowledge of the allegations in his motion.[8] Petitioner Hall further argues that Hipps conspired with McMahan to procure a verification for his July 24, 1992 motion, and conspired with Hyatt regarding the time and place of the ex parte hearing. These actions are not absolutely immune. Furthermore, prosecutors are not absolutely immune for advising the police. *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209 at 225, 113 S.Ct. 2606 (1993). Hipps coordinated with the State Bureau of Investigation and the Sylva Police Department in seizing SMUNIT and questioning its personnel. Hipps' actions in coordinating an investigation prior to criminal charges being brought are actions which precede the judicial phase of the prosecution and thus are not absolutely immune.

Hipps has altogether failed to demonstrate that any of his actions are entitled to absolute immunity. An official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.

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[7] North Carolina Court of General Justice, Superior Court Division, Jackson County, North Carolina.

[8] McMahan provided verification of Hipps' allegations, and swore under oath that the allegations were true and correct based on personal knowledge. (App. at A-) McMahan admitted in his Answer that he had limited knowledge of the Plaintiff's management of SMUNIT. (A-35)

Forrester v. White, 484 U.S. 219, 224, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988).

The Court has consistently pointed out one shortcoming of the *Imbler v. Pachtman* function test, noting that, although "several checks other than civil litigation prevent prosecutorial abuses in advising the police, 'one of the most important checks, the judicial process,' will not be effective in all cases, especially when in the end the suspect is not prosecuted." *Burns v. Reed*, 500 U.S. 478, 114 L.Ed.2d 547, 111 S.Ct. 1934 (quoting *Imbler v. Pachtman* at 430.)

The burden is on the innocent petitioner/accused to demonstrate that the denial of his Constitutional rights stemmed from actions that were not absolutely immune, and only in this way can he begin to vindicate his rights. *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209 at 225, 113 S.Ct. 2606 (1993).

Hipps' actions have gone unchecked by the "procedural safeguard" afforded by actual prosecution and the judicial process. Thus, the Imbler function test does not apply to or protect those who are never prosecuted, nor does it apply to those who are targeted by a judicial action which is investigatory in nature and which never results in any prosecution.

II. An individual's liberty interests under the due process clause of the Fourteenth Amendment are violated when he is repeatedly cited for having violated the law, without notice or a hearing, when said citations thwart his ability to work effectively in his job position and profession and curtail the likelihood of finding similar work in his profession.

The Fourteenth Amendment prohibits state deprivations of life, liberty, or property without due process of law. Whether a deprivation of due process has occurred

requires a multi-step analysis. First, was the Plaintiff deprived of an interest in life, liberty, or property? Second, if so, what kind of process, in the form of notice and a hearing, was due the plaintiff? See, e.g., *Robb v. City of Philadelphia* 733 F.2d 286, 292 (3d Circ. 1984); United States Constitution, Fourteenth Amendment, U.S.C.A.

The Petitioner asserts he was deprived of his Fourteenth Amendment liberty interests when Hipps and Hyatt, together and individually, made allegations and findings that the Petitioner had violated North Carolina state law and engaged in wrongdoing without having probable cause or competent evidence to support their claims. Similarly, Hipps and McMahan violated the Petitioner's rights when Hipps sought McMahan's sworn verification that the allegations in Hipps' July 24, 1992 motion were true to the best of McMahan's knowledge and belief, where Hipps apparently made no effort to ascertain the extent of McMahan's knowledge. "[W]here the State attaches a 'badge of infamy' to the citizen, due process comes into play." *Wisconsin v. Constantineau* 400 U.S. 433, 437; 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. at 437. As in the above case, the Petitioner, was given no opportunity, in the form of notice or a hearing, to defend himself. Petitioner did not become aware of Hipps' and Hyatt's actions until he arrived at SMUNIT headquarters to find it padlocked and saw a copy of Hyatt's Order on the door.

The basic elements of due process, notice and a hearing, are essential to prevent an ordinary citizen such as the Petitioner from becoming a "victim of an official's caprice." Id. At the time McMahan verified Hipps' motion, and Hipps and Hyatt held their ex parte hearing, the Petitioner was a deputy sheriff, and the injury to his good name and professional reputation that resulted from the

Respondent's actions caused damage to his credibility as a law enforcement officer and as a citizen. To be accused of and found, as a matter of law, to have violated state law when one is in law enforcement is squarely within the realm of the "unsavory label" which the Court envisioned when it held that such a label, when put in place by government without notice and without a hearing, was a violation of the Petitioner's liberty interests under the Fourteenth Amendment. *Wisconsin v. Constantineau* at 437.

The actions of the Respondents additionally violated the Petitioner's liberty interests when they caused Hall to be deprived of his position as Agent in Charge of SMUNIT, which was shut down as a result of the July 24, 1992 motion and order. Hall was given no notice and no hearing regarding his position as Agent in Charge, and his opportunity to function in that role ceased without warning when he arrived at work to find SMUNIT headquarters padlocked by the District Attorney's office and Hyatt's order. Since Defendants Hipps and Hyatt based their actions in large part upon the alleged and unsubstantiated wrongdoing of the Petitioner, and their actions resulted in his loss of position, reputation and salary, the deprivation suffered by the Petitioner is a violation of due process. *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (3rd Cir. 1984). Any employment action which results in a stigma against an employee's reputation, when accompanied by a loss of salary or a transfer to lesser position, or a stigma which curtails the employee's ability to seek similar work elsewhere is a violation of that employee's liberty interests under the due process clause of the Fourteenth Amendment. Id. See also *Siegert v. Gilley*, 500 U.S. 226, 114 L.Ed.2d 277, 111 S.Ct. 1789 (1991). Petitioner suffered a loss of his honor, credibility, and perceived integrity both professionally and personally, a loss of his position as Agent in Charge of SMUNIT which, in part, was a management role, and a loss of his $100.00 per week salary as Agent in Charge. He was

not given an opportunity to clear his name, and asserts he was the "victim of an official's caprice." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971). "Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." Id.

The Petitioner asserts that his future employment prospects were made nonexistent as a result of McMahan's, Hipps' and Hyatt's acts. "Although (*Paul v. Davis*) rejected a private employee's claim, it expressly reaffirmed *Roth*, *McElroy*, and other decisions recognizing that stigmatization deprives a person of liberty when it causes loss of present or future government employment." *Siegert v. Gilley*, 500 U.S. 226, 240; 114 L.Ed.2d 277, 293; 111 S.Ct. 1789, 1797; citing *Paul v. Davis*, 424 U.S. 693, 702-710, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); see also *Doe v. United States Department of Justice*, 753 F.2d 1092 (1985); *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (1984). The Petitioner, who was employed in a government position, and who retired on disability in large part because of his major depression stemming from the Respondents' acts, was not and is not employable as a law enforcement officer, let alone as a narcotics agent, due to the stigmatization caused by the Respondents' assertions, allegations, and findings that he had violated the law and mishandled evidence and funds.

The Petitioner asserts that he stated a cognizable deprivation of a liberty interest and has fairly stated a claim upon which relief may be granted, and therefore the Respondents' Motions to Dismiss and for Judgment on the Pleadings should have been denied by the U.S. District Court. In addition, the U.S. Court of Appeals should have viewed the Petitioner's plight as one which merits a recognition of his loss of liberty interests. The Petitioner was stigmatized by actions taken by state officials with the aid of a local official, and was never given the opportunity for timely notice or a hearing. Hall suffered, in addition to

his loss of reputation, the loss of his credibility and effectiveness as a law enforcement officer, the loss of his position and salary, and his ability to find future employment as a law enforcement officer. [9] Hall had been voted to be Agent in Charge by the SMUNIT Board of Directors, and expected to so serve unless removed for cause or due to resignation and reassignment.[10] He was instead left with a history of a psychiatric disorder mixed with allegations of mishandling and commingling of evidence and money, obviously making the Petitioner unemployable in his field. His resignation, though voluntary, was in large part motivated by the overwhelming depression he suffered after he was publicly disgraced.

III. The Petitioner suffered a loss of a property interest under the Fourteenth Amendment of the U.S. Constitution when he was publically censured and held to have violated state law in an ex parte hearing when he was denied all opportunity for timely notice and a hearing regarding said allegations.

The Respondents caused the Petitioner to be deprived of a title, position, and salary in a government-funded multijurisdictional task force that was governed by a Board of Directors. Hipps was a member of the Board of Directors by virtue of his position as District Attorney of District 30. Although the Petitioner did not have tenure or a written

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[9] In addition, the seizure of SMUNIT resulted in the loss of approximately 100 to 120 narcotics cases that had been developed by the SMUNIT agents.

[10] In July, 1992, the Plaintiff was suffering from Graves's Disease. He asked to be reassigned at the July 22, 1992 Board meeting due to his thyroid condition. The Board took no action on his request. (A-159,160)

contract securing his position as Agent in Charge, his position "was secured by a no less binding understanding" based on the Board of Directors' election of the Petitioner to his position. *Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed.2d 570, 599, 92 S.Ct. 2694 (1972). Furthermore, the SMUNIT Policy and Procedure Manual, Chapter III outlines SMUNIT's Code of Conduct, including the procedures for handling infractions and violations of the code. The Petitioner was never criticized, censured, or penalized by the Board or any of its individual members for any misbehavior while he was in office. The Policy and Procedure Manual acted as a de facto contract in which Petitioner understood that he would not be removed from his position without cause for misbehavior, or unless a majority of the members of the Board voted to replace him. He had "no less a 'property' interest in continued employment than a formally tenured teacher,... and had no less a procedural due process right to a statement of reasons and a hearing"[11] before the Board or any of its members sought to end his employment. Id. at 601. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Id. In addition, SMUNIT's annual grant had just been approved, ensuring that SMUNIT would be funded for the next year. As in *Perry v. Sindermann*, the Petitioner has alleged the existence of rules and understandings, promulgated and fostered by state and county officials, that "justify his legitimate claim of entitlement to continued employment absent sufficient cause." Id. at 602. As a member of the SMUNIT Board of Directors, Hipps was aware of SMUNIT's policies and procedures, and was on notice of Petitioner's on-the-job performance. Hipps stood in

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[11] Or at least an election.

the role of supervisor to Hall by virtue of being a member of the Board of Directors. He chose to accuse Hall of criminal acts via a motion to seize SMUNIT rather than to adhere to the SMUNIT procedures for questioning the conformance with existing law of Hall's acts. Hipps knew the procedures for handling misconduct, had the power to have Hall's job performance questioned and scrutinized, and had the continuous right to inspect SMUNIT headquarters, as provided for in the SMUNIT Policy and Procedure Manual's chapter, "Code of Conduct." Instead, Hipps accomplished these same tasks by obtaining an ex parte order based on an unverified motion.

IV. The Petitioner, having shown a deprivation of liberty and/or property interests, was denied his rights to procedural due process under the Fourteenth Amendment.

Had the Petitioner been permitted to amend his Complaint, he could have shown that he received $100 per week for his services[12]. He has also shown that he was in an elected position. The SMUNIT Charter contained a Code of Conduct which could be viewed as giving the Petitioner reason to think he would not be let go without cause, and at the least it would have taken a vote of the Board of Directors. During the July 22, 1992 meeting in which he asked to be reassigned[13], the Board took no action to reassign him, and the Petitioner continued to serve as Agent-in-Charge, and was acting in that position when Hipps had McMahan verify

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12 The U.S. District Court denied the Plaintiff's Motion to Amend his Complaint, even though several of the facts asserted were matters which the defendants had constructive knowledge by virtue of their seats on the SMUNIT Board of Directors.

13 Due to Graves Disease, a condition of the thyroid.

his motion and presented the motion in an ex parte hearing with Superior Court Judge Hyatt.

The Petitioner has sufficiently stated claims to both liberty and property interests. He need only plead a claim, and not the facts to prove the claim. *Jordan v. Bowman Apple Products*, 728 F.Supp. 409, 411 (W.D.Va. 1990); see also *U.S. v. Marisol, Inc.*, 725 F.Supp. 833 (M.D. Pa. 1989); *Spell v. McDaniel*, 591 F.Supp. 1090, 1099 (E.D.N.C. 1984). This Court has stated that the test is prospective, and that the issue is what the plaintiff can show, not what has been shown. *Conley v. Gibson*, 355 U.S. 41. 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The contents and outcome of Hipps' July 24, 1992 motion were widely disseminated to local and regional television stations, radio stations, and newspapers by Hipps. Garnering such publicity is not a function traditionally attributed to the role of prosecutor, and thus Hipps would not be absolutely immune for such actions. *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L.Ed.2d 209, 113 S.Ct. 2606 (1993); see also *Barbera v. Smith*, 826 F.2d 96 (2nd Cir. 1987).

The Petitioner's work site was seized and padlocked. He was taunted by criminal defendants. Given his line of work and the facts in this case, the actions taken by Respondents McMahan, Hipps, and Hyatt created "such a stigma or badge of disgrace" that a due process violation can be assumed, and the defendants' actions therefore required some form of notice and an opportunity to be heard. *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971).

Due process is not limited to actions taken by employers. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Id. In *Wisconsin v. Constantineau*, the court speculated that the Petitioner "may have been the victim of

an official's caprice," adding, "[o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." Id. The Petitioner was never given notice or a hearing, despite the fact that Hipps invited up to 48 people and numerous media people to his final hearing.[14] The Petitioner asserts that he should be free of capricious actions by local government officials taken under the guise of public office which victimize and stigmatize one's reputation and livelihood.

Petitioner Hall has, as of the date of this petition for Writ of Certiori, never been charged with any crime, has never been reprimanded by his superior officer for his actions in SMUNIT, and never received any sanctions for his alleged misconduct.

CONCLUSION

Based on the foregoing reasons, the petition for a writ of certiorari should be granted.

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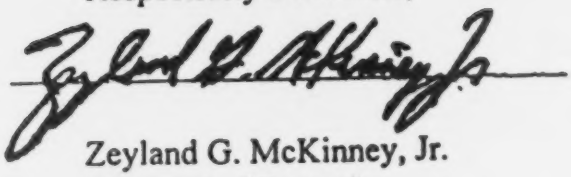
[14] This activity is also not traditionally one of a prosecutor, and Defendant Hipps should not be afforded absolute immunity as a defense. It should be noted that all hearings in 92 CRS 1395 were held ex parte.

Respectfully submitted,



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